NO. 84691-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE TIMES COMPANY,

Petitioner,

v.

HONORABLE SUSAN SERKO and HONORABLE BRYAN CHUSHCOFF,

Respondents.

BRIEF OF PETITIONER SEATTLE TIMES COMPANY

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I. INTRODUCTION

In the wake of the shootings of four Lakewood police officers last November, Petitioner Seattle Times Co. ("Times") asked the Pierce County Sheriff's Office ("PCSO") for police incident reports and other records related to its criminal investigation. The records were sought under the Public Records Act ("PRA"), RCW 42.56.010 *et seq.*, Washington's "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PCSO was prepared to release the records, but seven individuals – all facing charges as accomplices in the shootings – moved for an injunction categorically barring their release. Defendants' primary claim was that release of these police reports might lead to future news coverage about the shootings, which could jeopardize the fairness of their pending trials. Defendants did not object to release of any particular record. Rather, they claimed that the trial court was required to enjoin disclosure of ***all*** of them.

Defendants' position is foreclosed by *Cowles Publishing Co. v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (1999), which holds that (1) a defendant's constitutional right to a fair trial does not compel categorical nondisclosure of all investigative records about the underlying case, and (2) investigative records are presumptively

disclosable where, as here, a suspect has already been identified and charged. *Cowles* recognizes that release of police incident reports prior to trial rarely will pose any risk to a defendant's fair trial rights. Under *Cowles* and the PRA, investigative records may be withheld only upon a showing that nondisclosure of specific information is necessary to protect the trial process.

In ruling on defendants' motion, however, Respondent Judge Serko disregarded *Cowles*. Instead, in an order dated May 20, 2010 (the "May 20 Order") Judge Serko held that the public has "no constitutional right" of access in criminal matters, and that defendants' fair trial rights trumped the requesters' right of access to the investigative records under the PRA. CP 205, 210. The May 20 Order does not make any finding that nondisclosure of the police records was necessary to prevent prejudicial news coverage. On the contrary, the order finds that publicity surrounding the case to date posed no threat to the court's ability to seat an impartial jury in Pierce County. The order speculates, however, that further release of information about the investigation "may" jeopardize defendants' fair trial right.

The May 20 Order misapplies controlling law and must be reversed. In addition to ignoring *Cowles*' presumption of access, the order is overly deferential to unsupported apprehension about pretrial publicity.

The mere possibility of additional news coverage – without any evidence that it is likely to pose any serious risk of prejudice, or to make seating an impartial jury difficult – is not enough to threaten a defendant's constitutional right to fair trial, under numerous decisions of this Court and the U.S. Supreme Court (including, most recently, *Skilling v. U.S.*, 130 S. Ct. 2896 (June 24, 2010)). Indeed, the May 20 Order is self-refuting: it recognizes that defendants have provided ***no*** evidence of "the actual impact of publicity on potential jurors," which is required to sustain a claim of pretrial prejudice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 41, 640 P.2d 716 (1982); *see* CP 210.

Compounding the errors below, upon securing the May 20 Order defendants immediately sought to seal trial exhibits that had already been used in open court at the well-attended trial of one of the seven defendants. On June 9, Respondent Judge Chushcoff entered an *ex parte* order sealing the trial exhibits, based on nothing but the May 20 Order's conclusion that disclosure of those documents "may" lead to future news coverage about the case. As of this writing, many of those trial exhibits remain sealed. At no time have defendants provided any evidence that would support the findings required to seal court records under *Ishikawa* or *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005).

The decisions below all rest on a misguided anxiety, unsupported by a shred of factual support, that future news coverage may infringe on the fair trial rights of the remaining six defendants. Based on well established PRA and fair trial principles, this Court should order the court below to rescind the May 20 Order and the sealing orders that rely on it, and to permit access to the records at issue. The Court should hold, as it has previously, that police records are presumptively subject to PRA disclosure when the defendant in the underlying incident has already been charged; that exemptions to disclosure must be narrowly construed, and must be supported by evidence showing that release of the particular information poses a specific risk to defendant's fair trial right; and that claims of allegedly prejudicial publicity must be scrutinized, with full consideration of alternatives to nondisclosure that would assure the seating of an impartial jury.

II. ASSIGNMENTS OF ERROR

Assignments of Error:

1. Respondent Pierce County Superior Court Judge Serko, in the order entered on May 20, 2010, and the order denying reconsideration on June 7, 2010, erred by enjoining the release of records sought by the Times and others under the Public Records Act.

2. Respondent Pierce County Superior Court Judge Chushcoff, in the order entered June 9, 2010, and subsequent orders of the trial court, erred by sealing the trial exhibits previously entered in open court at the Latanya Clemmons trial.

Issues Pertaining to Assignments of Error:

1. *Cowles Publishing Co. v. Spokane Police Department* holds that police reports are presumptively subject to disclosure when they relate to incidents in which a suspect has already been referred for prosecution. Is a generalized concern that disclosure of police reports "may" lead to future pretrial publicity sufficient to overcome the *Cowles* presumption? (Assignment of Error 1)

2. On the record presented, did the court below err in finding that defendants' constitutional right to a fair trial required withholding otherwise disclosable public records? (Assignments of Error 1 and 2)

3. On the record presented, may trial exhibits entered in an open, well-attended criminal trial subsequently be sealed, based on generalized concerns about the possible effect future pretrial publicity might have on other defendants awaiting trial? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. The PRA Requests at Issue

On November 29, 2009, Maurice Clemmons shot and killed four Lakewood police officers at the Forza coffee shop in Parkland, Washington. Steve Miletich, a news reporter covering the shootings and their aftermath for the Times, subsequently asked the PCSO for certain public records related to the Clemmons investigation. He requested, orally at first and in writing on December 17, 2009, incident reports relating to the investigation inside the coffee shop. CP 412. He made a separate written PRA request on December 17, 2009, for PCSO reports related to events outside the coffee shop after the shootings. CP 413. On January 4, 2010, he requested records held by the PCSO related to ATF "gun trace" information in connection with the shootings. CP 414. All of the Times' requests were directed to the PCSO, not the prosecutor.

The PCSO received PRA requests from four other requesters, including attorney Michael Hanbey. CP 11-12. Hanbey has intervened and joined in the Times' Petition. *See* July 9, 2010 Order ¶ 3.

The PCSO identified 43 categories of police records in its possession that are responsive to the requests. CP 95-99. In summary, the responsive records consist of incident reports from the PCSO and other investigating agencies; communications between various agencies; witness

statements; transcripts of recorded interviews; ATF reports; and surveillance and other photographs. *Id.*

The PCSO processed the PRA requests and was prepared to release these records, and would have done so had motions to enjoin their release not been filed. *See* CP 417, 468-69. At no time has the PCSO claimed that any of the requested records are exempt from disclosure under the PRA. In particular, neither the PCSO nor the Pierce County Prosecutor's Office has claimed that nondisclosure of the records is "essential for effective law enforcement," as required to invoke the PRA's investigative records exemption. *See* RCW 42.56.240(1).

B. Motions to Enjoin the PRA Requests

The State has filed criminal charges against seven alleged accomplices of Maurice Clemmons. One, Latanya Clemmons, has already been tried. Of the six awaiting trial, five have intervened in this case: Darcus Allen, Ricky Hinton, Eddie Lee Davis, Douglas Davis, and Quiana Williams. July 9 Order ¶ 4.

In March 2010, defendants moved to enjoin the PCSO from producing "any and all" records responsive to the Times' PRA request. CP 1-6, 370-74, 464-75, 489, 494-96. The motions were brought in the individual criminal actions, pursuant to RCW 42.56.540, a section of the PRA that allows a party named in or referred to in a public record to seek

to enjoin its release.[1] The motions claimed that the records were exempt under the PRA and that disclosure would impair defendants' right to a fair trial. CP 3-4, 383-87, 464, 498-500. None of the motions was supported by any evidence regarding pretrial publicity to date. None identified any specific record that, if released, would pose any particular concern about pretrial publicity. *See* CP 210:22-24.

The Times opposed the motions. CP 41. The Times argued, among other things, that (i) under *Cowles*, the records were not exempt from disclosure under the PRA's investigative records exemption (RCW 42.56.240(1)); and (ii) defendants failed to show that disclosure imperiled their fair trial rights. *Id.*

Judge Arend initially ruled, on March 31, that defendants were required to pursue their PRA objections in a separate declaratory action pursuant to RCW 42.56.540. CP 59, 60. She reconsidered that order on May 7 after some of the defendants objected that they could not secure funding or an attorney to file a civil action. CP 64, 375-79. The May 7 order directed the PCSO to submit the records at issue for a consolidated *in camera* review by "[a] sitting Judicial Officer of Pierce County," to

[1] All of the criminal cases, other than that of Darcus Allen, were pending before Pierce County Superior Court Judge Arend at the time the PRA injunction motions were filed. Allen was subsequently permitted to intervene before Judge Arend for the limited purpose of allowing a consolidated review of the PRA issues. *See* CP 109..

determine whether any PRA exemption applied and whether release of any of the records would impair defendants' right to a fair trial. CP 109.

On May 14, 2010, defendants submitted further objections to disclosure of the PCSO documents. They argued that, except for four records concerning an unrelated incident involving an individual who had previously been tried for falsely claiming responsibility for the shootings, all of the PCSO investigative records were categorically exempt under the PRA and the Sixth Amendment. CP 114. The Times responded to these objections on May 18, noting, among other things, that the records were presumptively disclosable under *Cowles*. CP 155, 156.

C. Judge Serko's PRA Order of May 20, 2010

The *in camera* review was referred to Judge Serko. She reviewed a CD and index of documents submitted by the PCSO. CP 95, 206. In an order dated May 20, 2010, she concluded that all of the records, other than the four unrelated items to which defendants did not object, were exempt from disclosure under RCW 42.56.540 and defendants' right to a fair trial. CP 205, 211-25.

The May 20 Order suggested that the records might be exempt under the PRA's investigative records exemption as construed in *Newman v. King County*, 133 Wn.2d 565, 947, P.2d 712 (1997), because the death penalty investigation against defendant Darcus Allen was still "ongoing."

CP 209. The court's analysis on this point does not discuss *Cowles* (decided two years after *Newman*, and holding that *Newman*'s categorical bar on the release of police records where the investigation is "ongoing" does not apply after "the suspect is arrested and the case referred to the prosecutor." *Cowles*, 139 Wn.2d at 481). Ultimately, the court found it unnecessary to rest on the investigative records exemption, because it believed that nondisclosure was mandated by a separate fair trial exemption and by RCW 42.56.540, the PRA's injunction provision.

With respect to the fair trial rights, the May 20 Order started from the premise that "[m]embers of the public have no constitutional right to attend criminal trials." CP 210 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 391 (1979)).[2] The order goes on to note that "Defendants do not provide data, statistics, print or video stories to substantiate their positions that pretrial publicity will jeopardize Defendants' right to a fair and impartial jury." CP 210. This is correct: at no time have any of defendants identified a single inflammatory article, or a single bit of evidence, to support their contention that pretrial publicity posed a danger to their right to obtain a fair trial. Nevertheless, the May 20 Order states:

> The Court takes judicial notice of the extraordinary level of local, state and national attention that this story garnered

[2] At a June 7 hearing on objections to the May 20 Order, Judge Serko clarified this conclusion: "I should have said ... that members of the public have no constitutional right under the Sixth and Fourteenth Amendments." 6/7/10 RP 37:6-9.

> for days and weeks following the November 29, 2009 event. By recognizing the extensive coverage of these cases by the media, the Court does not suggest that a fair and impartial jury and proceeding cannot occur in Pierce County; however, further release of investigative materials and details may jeopardize that right which in turn justifies exemption under the PRA.

CP 211. Based on this sole factual finding, the May 20 Order held that defendants' fair trial rights justified blanket nondisclosure of all of the police records related to the Maurice Clemmons investigation. CP 211-25.

The May 20 Order invited the parties to submit written objections. CP 225. The Times did so on May 28, and defendants responded. CP 227, 244. At a hearing on June 7, Judge Serko construed the Times' objections as a motion to reconsider, which she then denied. CP 241.

D. Judge Chushcoff's Sealing Order of June 9, 2010

The trial of one of Maurice Clemmons' seven alleged accomplices, Latanya Clemmons, began on May 17, 2010. Judge Arend presided. The record before Judge Serko and this Court contains no evidence that any difficulty was encountered in seating an impartial jury to try that case.

The courtroom was packed with spectators, including a significant number of news reporters, every day of the trial. RP (7/14/10) 47:18-20 (comments of Judge Arend). Television cameras were permitted, and they recorded testimony. *See, e.g.*, http://tinyurl.com/2e2ozg8 (5/24/10 KING-5 news coverage). Trial exhibits – including some that were among the

records withheld from the Times pursuant to the May 20 PRA Order – were entered into evidence in open court, and were reported on in the press. *E.g.* http://tinyurl.com/2c2qecg (*Seattle Times* story reporting on taped interview with Latanya Clemmons played at her trial); CP 315 (exhibit list).

The evidentiary portion of the trial was complete prior to June 9, 2010. On that day – which was two days after Judge Serko heard objections to and denied reconsideration of the May 20 PRA order – counsel for defendant Eddie Davis moved *ex parte* to seal all of the Latanya Clemmons trial exhibits. The only ground offered in support of the motion was the May 20 Order. CP 259-85. The May 20 Order, however, did not address sealing at all – either as a general matter or with respect to the Clemmons exhibits in particular.

Judge Chushcoff entered the *ex parte* order on June 9, 2010, sealing "all exhibits admitted in the case of State v. Clemmons ... pending examination of these exhibits by defense counsel[.]" CP 287 ("June 9 Order"). The order contained no finding that "the specific sealing ... is justified by identified compelling privacy or safety concerns [that] outweigh the public interest in access to the court record," as required by GR 15(c)(2). Nor does the order consider less restrictive alternatives to

blanket sealing, as required by GR 15, *Rufer*, and other cases. The June 9 Order set a hearing on the merits of the motion for June 25, 2010.

E. Subsequent Sealing Orders and Grant of Review

On June 25, Judge Arend extended the June 9 Order for scheduling reasons, setting a hearing on the merits of the *ex parte* sealing order for July 14, 2010. CP 290, 294. Judge Arend ordered certain exhibits to remain sealed, including all of the Latanya Clemmons trial exhibits that were among the records reviewed by Judge Serko, and certain exhibits that were marked but not admitted at the trial. Judge Arend ordered unsealed (a) certain exhibits that were admitted at trial and that were not among the records reviewed by Judge Serko in the May 20 Order, and (b) certain exhibits to which defense counsel supposedly had no objection to unsealing (although, as noted below, defendant Allen subsequently moved to seal all of these exhibits). CP 294, 297. Defendants submitted further briefing in support of their motions to seal prior to the July 14 hearing, and the Times responded. CP 309, 345.

On July 9, this Court retained the Times' Petition for Writ of Mandamus for a decision on the merits, and granted expedited review. Paragraph 8 of the July 9 order specifically permitted the Pierce County Superior Court to proceed with the July 14 hearing on the *ex parte* sealing order.

Judge Arend held a hearing as scheduled on July 14. Defendants again failed to identify any prejudicial news coverage to justify the sealing (even as to coverage from the by-then completed Latanya Clemmons trial). On the contrary, counsel for one defendant stated that no such coverage existed, and that the concern was based on future articles that might result from unsealing the exhibits previously entered in open court at the trial. RP (7/14/10) 30:3-9.

At the July 14 hearing, Judge Arend ordered unsealed 32 Clemmons trial exhibits (only two of which were among the records that had been reviewed *in camera* by Judge Serko). *Compare* CP 298 *with* CP 363 (Exhibits 112 and 113); RP (7/14/10) 10:11-24. Judge Arend ordered that four trial exhibits – autopsy reports that were not reviewed by Judge Serko because they were not responsive to the Times' PRA requests – remain sealed. *Compare* CP 298 (point I and II) *with* CP 363 (point 3) (Exhibits 62-65). Finally, she reserved decision on 21 trial exhibits, which include police reports and witness statements that were among the public records reviewed *in camera* by Judge Serko. *Compare* CP 298 (point II) with CP 363 (point 4). No further ruling has been made as of this writing.

Judge Arend stayed her order to permit further challenges to unsealing. CP 363. She did this in particular to allow defendant Allen to seek a sealing order from the judge presiding in his case, Pierce County

Judge Fleming. CP 363; RP (7/14/10) 36:11-23; 58:6-10, 59:17-60:2. Judge Arend did so even as to exhibits she was unsealing that, in her view, appeared to have no effect on Allen's fair trial rights. *Id.* at 31:21-32:3.

Allen, who is an Intervenor in this mandamus action, filed a "Motion to Maintain Exhibits Under Seal" with Judge Fleming on July 22, 2010.[3] Allen seeks to seal many of the Latanya Clemmons trial exhibits, including those that Judge Arend had previously ordered unsealed with the supposed agreement of defense counsel. *Id.*; CP 299. A hearing on that motion is currently scheduled for August 3.

In sum, as of this writing numerous trial exhibits that were used to convict Latanya Clemmons and that were public for a period of time remain sealed, all on the strength of a PRA order that did not consider the standards for sealing court records.

IV. SUMMARY OF ARGUMENT

The May 20 Order must be rescinded because it categorically denies access to police reports without any showing that nondisclosure was essential to effective law enforcement or to protect defendants' fair trial rights. Under *Cowles*, such investigative records are presumptively disclosable, even in the face of an allegation that disclosure might result in pretrial publicity or otherwise threaten defendants' constitutional right to a

[3] This filing was not available for inclusion in the Clerk's Papers. The Times will supplement the record.

fair trial. (Section V.B below). Defendants have not overcome the *Cowles* presumption: they rely entirely on generalized and unsupported apprehension about potential future news coverage, which is insufficient to justify nondisclosure under both the PRA (Section V.C.1) and decisions construing allegations of prejudicial pretrial publicity in other contexts (Section V.C.2). The May 20 Order is also inconsistent with the *Ishikawa* line of cases, because it fails to weigh the public's interest in access or to consider alternatives short of blanket nondisclosure. (Section V.C.3).

No other PRA exemptions apply to the records at issue. Contrary to the May 20 Order, the PRA's injunction provision (RCW 42.56.540) is not an independent exemption to disclosure. Nor are the records exempt as work product. (Section V.D).

The orders sealing the Latanya Clemmons exhibits are plainly unconstitutional under *Ishikawa*, *Rufer* and *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004). (Section V.E). The orders, which seal exhibits previously used in open court to try and convict Clemmons, contain none of the specific findings and none of the careful analysis required by these article I, § 10 cases.

V. ARGUMENT

A. Standards of Review

This Court reviews decisions under the PRA *de novo*. RCW 42.56.550(3); *Burt v. Washington State Dep't of Corr.*, 168 Wn.2d 828, 831-32, 231 P.3d 191 (2010); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) ("*PAWS*"). Where, as here, the record consists entirely of documentary evidence and the trial court has not heard testimony requiring it to assess witness credibility, this Court stands in the same position as a trial court. *Id.*, 125 Wn.2d at 252-53.

In construing the PRA, this Court takes into account the statute's stated goal of assuring the sovereignty of the people over the agencies that serve them: "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." RCW 42.56.030; *see PAWS*, 125 Wn.2d at 251 (PRA's purpose "is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions"). The Court interprets challenges to disclosure in light of the PRA's policy "that free and open examination of public records is in the

public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

The legal standard for sealing or unsealing court records is a question of law that this Court reviews *de novo*. *Rufer*, 154 Wn.2d at 540. A trial court's application of the legal rules governing sealing is reviewed for abuse of discretion, with remand appropriate if the incorrect standard is applied. *Id.* This Court's review of sealing orders begins "with the presumption of openness," based on the state constitution's mandate that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." *Id.* (quoting Const. art. I, § 10).

B. The Police Records Sought By The Times Are Subject To Disclosure Under The PRA

A party seeking to enjoin disclosure of public records sought under the PRA bears the burden of proving that a specific statutory exemption applies. RCW 42.56.070(1); *PAWS*, 125 Wn.2d at 251. PRA exemptions are construed narrowly. RCW 42.56.030. Moreover, simply citing an exemption is not enough to enjoin release; the opponent of disclosure must further establish that release would "clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions."

RCW 42.56.540; *see Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 756-57, 174 P.3d 60 (2007).

Defendants in this case relied primarily on the PRA's investigative records exemption, which applies to "[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies ... the nondisclosure of which is essential to effective law enforcement[.]" RCW 42.56.240(1).[4] Courts narrowly construe the term "essential to effective law enforcement" in favor of disclosure. *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005).

The position of defendants is that investigative records related to the events of November 29 are categorically exempt from disclosure under RCW 42.56.240(1) because aspects of the investigation allegedly are still "ongoing," and because disclosure allegedly would interfere with their ability to obtain a fair trial. Both of these arguments are precluded by *Cowles Publishing Co. v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (1999).

[4] Formerly RCW 42.17.310(1)(d).

1. Under *Cowles,* the Records Are Presumptively Disclosable

Cowles sets out the analysis courts must apply where, as here, a PRA requester seeks police investigative records while the underlying criminal trial remains pending. The requester in *Cowles*, a newspaper, sought an incident report a week after the defendant in the matter had been arrested and referred for prosecution. The Court of Appeals held, just as Judge Serko did here, that the police investigative records were categorically exempt from disclosure until after the criminal proceedings were complete. CP 226; *Cowles*, 139 Wn.2d at 476. This Court reversed, and held that in any case where a suspect has been arrested and referred to the prosecutor for charging, investigative records related to the case are "presumptively disclosable upon request." *Id.* at 481; *see also id.* at 479-80 ("[W]e hold in cases where the suspect has been arrested and the matter referred to the prosecutor, any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file"). Such records must be disclosed unless the opponent of disclosure establishes, on a "case-by-case" basis, that nondisclosure of specific information is "essential to effective law enforcement." *Id.* at 480. The *Cowles* presumption applies here, because

all of the defendants challenging release of the police records sought by the Times have been referred to the prosecutor and charged.

2. The May 20 Order Ignores the *Cowles* Presumption of Access and Misconstrues the PRA's Investigative Records Exemption

The May 20 Order's discussion of the investigative records exemption ignores *Cowles*. CP 208-09. Instead, relying on *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997), Judge Serko suggested that the records might be exempt from disclosure because prosecutors have not yet decided whether to seek the death penalty against defendant Allen, and thus the investigation could be considered "ongoing." This conclusion is incorrect, for two distinct reasons.

First, *Newman* is inapplicable to cases (like this one) in which the defendant has already been identified and charged. The question in *Newman* was whether withholding records of a 25-year-old homicide investigation in which no suspect had been identified was "essential to effective law enforcement." This Court held that it was, based on deference to the investigating agency's claims that it was still pursuing leads and that the case was "leading toward an enforcement proceeding." *Id.* at 573. But *Newman* was cabined to its facts in *Cowles*, which articulates a different standard for evaluating the disclosure of police investigative records ***after*** "the suspect is arrested and the case referred to

the prosecutor." *Cowles*, 139 Wn.2d at 481. Accordingly, *Cowles*, not *Newman*, is the correct standard in a case like this one, where the defendants have already been charged.

Second, under both *Cowles* and the plain language of the PRA, the issue is not whether some aspect of the investigation can be deemed "ongoing," but whether nondisclosure is "essential to effective law enforcement." RCW 42.56.240(1). The May 20 Order cites no evidence (and defendants have offered none) to suggest that releasing the records at issue would affect the prosecutor's ability to make the death penalty decision, or impair any other law enforcement function. Notably, neither the Pierce County Sheriff's Office nor the prosecutor has asserted that nondisclosure is essential to protect any aspect of their investigation.

The fact that Allen's is a potential death penalty case does not alter the public records analysis. Under *Cowles*, the presumption that police records are disclosable does not depend on the severity of the crime, or the alleged state of the investigation: "In sum, we hold ***in cases where the suspect has been arrested*** and the matter referred to the prosecutor, ***any potential danger to effective law enforcement is not such as to warrant categorical nondisclosure of all records in the police investigative file.***" *Cowles*, 139 Wn.2d at 479 (emphasis added). Only those portions of the

records that are in fact essential to effective law enforcement may be redacted; the rest must be released.

Nor can the May 20 Order's disregard of *Cowles* be justified on the ground that defendants here have invoked their constitutional right to a fair trial. *Cowles* specifically contemplates this situation, holding that disclosure under the PRA need not wait until the judicial process has run its course, and that a defendant's constitutional fair trial right does not require maintaining blanket secrecy of all related police records:

> Nor does a defendant's ***constitutional right to a fair trial*** compel categorical nondisclosure of police investigative records. ***Facts regarding pending criminal prosecutions are often made public prior to trial. This rarely results in the inability to impanel a fair and impartial jury***.... The general public is well aware that a person is innocent until proven guilty.

Id. at 479 (emphasis added). Rather than "categorical nondisclosure," *Cowles* presumes access, and requires that to the extent nondisclosure of information is nevertheless necessary to protect the trial process, "the trial court should make that factual determination on a case-by-case basis." *Id.*

In sum, the May 20 Order simply cannot be squared with *Cowles*. Most fundamentally, the order fails to acknowledge the presumption of access. Remarkably, the May 20 Order starts from the presumption that the public has ***no*** right of access to criminal matters at all – an obvious misstatement of the law, based on a misreading of *Gannett Co. v.*

DePasquale, 443 U.S. 368, 378 (1979).[5] CP 210. In Washington, the public's right of access is guaranteed by article I, § 10 of the state constitution, which "gives the public and the press a right to open and accessible court proceedings." *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); *see Ishikawa*, 97 Wn.2d 30; *Rufer*, 154 Wn.2d 530.

Moreover, the May 20 Order fails to subject defendants' fair trial claims to any meaningful scrutiny, allowing blanket nondisclosure without any case-by-case determination that release would impair effective law enforcement or defendants' fair trial rights. This Court should hold that the *Cowles* presumption of access applies here, and – as discussed in the next section – that it has not been overcome on the facts presented.

C. Defendants' Unsupported Concerns About Potential Pretrial Publicity Are Insufficient To Justify Categorical Nondisclosure of Police Records

The May 20 Order ultimately rests on the trial court's conclusion that defendants' fair trial rights "trump" any right of access that the Times

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[5] *Gannett* states only that the ***Sixth*** Amendment's guarantee of a "right to a ... public trial" belongs to the defendant, not to the public. 443 U.S. at 381. But a defendant also does not have "the right to compel a private trial," *id.* at 382. More important, a year after deciding *Gannett*, the Supreme Court explained that the public does have a right of access to criminal trials arising under the ***First*** Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 573 (1980) (also recognizing that *Gannett* did not decide the First Amendment issue). Federal courts have repeatedly recognized that the "first amendment guarantees the public and the press the right to attend criminal trials." *Seattle Times v. U.S. District Court*, 845 F.2d 1513, 1515 (9th Cir. 1988); *accord, Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

or the public has under the PRA. CP 210-11; RP (6/7/2010) at 37:2. But the court did not find – and had no basis for finding – that disclosure of the police reports at issue was likely to result in prejudicial pretrial publicity. In fact, Judge Serko found that news coverage of the events of November 29, 2009, had ***not*** resulted in any pretrial prejudice to these defendants: "By recognizing the extensive coverage of these cases by the media, the Court does not suggest that a fair and impartial jury and proceeding cannot occur in Pierce County[.]" CP 211. The court nevertheless concluded, without reference to any fact or argument, that "further release of investigative materials and details ***may*** jeopardize that right, which in turn justifies exemption under the PRA." *Id.* (emphasis added). This is the sum and substance of the "findings" supporting blanket nondisclosure.

This Court should reject the May 20 Order's conclusion that access to police records can be categorically denied based on mere speculation about possible future news coverage. The May 20 Order is contrary to *Cowles*' presumption of access (section 1 below); to the decisions of this Court and the U.S. Supreme Court construing criminal defendants' claims of prejudicial pretrial publicity (section 2 below); and to *Ishikawa* and its progeny, which set forth the showing that must be made before the public is denied access based on alleged fair trial concerns (section 3 below).

Under each of these three standards, as detailed below, a trial court faced with a claim that disclosure of police records would threaten the defendant's right to a fair trial must do the following. First, it must start from a presumption that the records are disclosable. Second, it must scrutinize the defendant's claim of prejudice carefully, including by distinguishing between news coverage about the case generally and publicity that would in fact jeopardize the ability to seat an impartial jury. Third, in making this determination, the court also must carefully consider alternatives to nondisclosure, such as searching voir dire and careful jury instructions, that could obviate any prejudice. Fourth, any nondisclosure should be limited to specific material that poses an identifiable threat to the defendant's fair trial right. Finally, the basis for withholding any material must be specified, and the remaining material must be released.

1. Defendants Here Have Not Overcome the *Cowles* Presumption

The issues presented by the May 20 Order may be decided entirely under the PRA and *Cowles*. *Cowles* recognizes that police investigative records are presumptively subject to disclosure even in the face of a claim that release might result in pretrial publicity that allegedly threatens a defendant's constitutional right to a fair trial. *Cowles*, 139 Wn.2d at 479. While courts may "review the potential [e]ffect of disclosure on the trial

process" under the statutory investigative records exemption, *id.* at 478, that review begins with the presumption that the records are publicly available where the defendant has already been identified and charged.

Moreover, application of the exemption must be subject to the same standards required to invoke any other PRA exemption. Again, that means that the party opposing disclosure bears the burden of proving that the exemption applies. RCW 42.56.070(1); *PAWS*, 125 Wn.2d at 251. The exemption must be construed narrowly, and any withholding must be justified "with particularity," with an explanation as to how the exemption applies to each specific record. *Id.* at 271; RCW 42.56.210(3). Entire documents should not be withheld when redaction of limited material would suffice to protect the asserted law enforcement or fair trial concern. *See Cowles*, 139 Wn.2d at 479 (noting that court should determine *in camera* whether exemption applies to any document "or portions of a document"); RCW 42.56.070(1), .210.

Cowles makes clear that nondisclosure based on fair trial concerns is rare: pretrial disclosure of police records "rarely results in the inability to impanel a fair and impartial jury." 139 Wn.2d. at 479. In sum, under *Cowles* and the PRA, withholding police records based on fair trial concerns requires a case-by-case, fact-specific finding – not mere

speculation or conclusory statements – that release of a record or portion thereof will in fact pose a serious risk of interfering with a pending trial.

Courts construing other public records laws have reached the same conclusion in similar circumstances. For example, the federal Freedom of Information Act exempts from disclosure investigative records to the extent that production would "deprive a person of a right to a fair trial or an impartial adjudication." 5 U.S.C. § 552(b)(7)(B). A party asserting this exemption must establish, as a factual matter, "that it is more probable than not that disclosure of the material sought would ***seriously interfere*** with the fairness of those proceedings." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1998) (emphasis added). This "burden cannot be met by mere conclusory statements"; the party opposing disclosure must show how "release of the particular material" would interfere with the trial. *Id.* at 101. Where the claim is that disclosure will lead to future news coverage, the opponent of disclosure must show that the additional publicity is "not just disadvantageous ... but of a nature and degree that judicial fairness would be compromised." *Id.* at 102; *accord, Dow Jones Co. v. Emshwiller*, 219 F.R.D. 167, 170 (C.D. Cal. 2002). Similarly, under Michigan's public record law, police incident reports cannot be withheld based on the mere possibility that disclosure "could" taint jurors or witnesses: "Without more particularized reasons

articulated on the record ... the trial court's rationale is insufficient to uphold the trial court's conclusion that the entire report is exempt from disclosure[.]" *State News v. Mich. State Univ.*, 735 N.W.2d 649, 660, (Mich. App. 2007), *rev'd in part on other grounds*, 753 N.W.2d 20 (Mich. 2008).

The May 20 Order makes no finding that disclosure of any of the police records at issue would pose any danger to – much less a probability of serious interference with –defendants' fair trial rights. Defendants submitted no evidence to support such a finding. The trial court ordered blanket nondisclosure based on speculation about what "may" result from future news coverage – despite also acknowledging that the news coverage to date posed no threat to defendants' ability to obtain a fair trial. CP 211. That is plainly insufficient to justify nondisclosure under RCW 42.56.240(1) and *Cowles*.

2. Defendants Have Not Established That Pretrial Publicity Threatens Their Constitutional Fair Trial Rights

Independently, the May 20 Order mischaracterizes the scope of defendants' constitutional right to a fair trial. The court's finding that this constitutional right is violated by the mere possibility of pretrial publicity – without any factual showing that such publicity has been or likely will be inflammatory, and without any consideration of alternatives that would

protect the integrity of the upcoming trials – is directly contrary to decisions of this Court and the U.S. Supreme Court. These decisions make clear that pretrial publicity poses no constitutional threat under the circumstances presented here.

a. The May 20 Order Did Not Find That News Coverage of the Case Was, or Is Likely To Be, Prejudicial

This Court has held repeatedly, in a variety of contexts, that a generalized fear of publicity is insufficient to threaten a defendant's fair trial rights. "Pretrial publicity need not impair the defendant's right to a fair trial if the various alternative methods of dealing with the problem will be adequate to the task. . . . Alternatives identified by other courts include searching voir dire, clear and emphatic cautionary instructions, change of venue, continuance of the trial date, and sequestration of the jury." *State v. Bassett*, 128 Wn.2d 612, 617, 911 P.2d 385 (1996) (reversing pretrial "gag order" on attorneys). The relevant question in assessing pretrial publicity is whether the court will be unable to seat an impartial jury. In evaluating whether publicity justifies a change of venue, for example, courts look to such factors as whether or not the publicity was inflammatory; when such publicity occurred relative to trial and how extensively it was circulated; difficulties encountered in selecting a jury; the nature of the charges; and the size of the area from which the jury pool

is drawn. *State v. Jackson*, 150 Wn.2d 251, 269-70, 76 P.3d 217 (2003) (extensive pretrial publicity did not warrant change of venue); *State v. Rice*, 120 Wn.2d 549, 557, 844 P.2d 416 (1993) ("fact that a majority of prospective jurors had knowledge of the case, without more, is irrelevant. . . . The relevant analysis is whether the jurors had such fixed opinions that they could not act impartially").

Regarding "the inflammatory or noninflammatory nature of the publicity," *Jackson*, 150 Wn.2d at 270, this Court has made clear that news coverage, even when extensive, will not be deemed inflammatory when it is generally factual in nature, and when it is the crime, rather than the reporting of it, that generates the public reaction. *Rice*, 120 Wn.2d at 557; *State v. Clark*, 143 Wn.2d 731, 757, 24 P.3d 1006 (2001) (no prejudice where news coverage of crime was widespread but "media coverage itself didn't create the inflammatory publicity as much as the facts of the crime, and the coverage itself did not appear to be designed or directed to inflame").

The May 20 Order ignores this authority. It makes no findings that the news coverage of the events of November 29 has been at all inflammatory. In fact, it finds the opposite – it notes that while the coverage has been extensive, it did not imperil the court's ability to seat an

impartial jury in Pierce County. Instead, the order relies entirely on speculation about potential future news coverage.

This Court has previously held that trial judges may not simply presume that news coverage about an event is necessarily prejudicial. For example, in the portion of *Ishikawa* discussing pretrial publicity, this Court noted:

> Other than acknowledging that petitioner-newspapers had covered the murder itself (some 6 months earlier) the [trial] court included no other factual findings or legal conclusions in the record. ... The court's legal conclusions were not substantiated by the factual findings . . . For example, there is no evidence that the judge considered the actual impact of publicity on potential jurors[.]

Ishikawa, 97 Wn.2d at 41. The May 20 Order makes these same errors.

The May 20 Order is also inconsistent with the U.S. Supreme Court's view of the limited circumstances in which pretrial publicity implicates Sixth Amendment rights. "Prominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." *Skilling v. U.S.*, 130 S. Ct. 2896, 2915 (June 24, 2010). Reviewing its previous pretrial publicity cases, the Court stated that prejudice sufficient to threaten the constitutional fair trial right generally arises only in situations where the trial itself was "utterly corrupted by press coverage." *Id.* at 2914 (quoting *Murphy v. Florida*, 421 U.S. 794 (1975)).

In *Skilling*, six justices found that former Enron CEO Jeffrey Skilling received a fair trial on criminal fraud charges in Houston, despite heavy local news coverage and the significant damage that Enron's collapse caused there.[6] Unlike defendants here, Skilling at least attempted to create a record to support his claims of prejudice: he chronicled more than 4,000 print and 19,000 television news stories about Enron prior to his trial, and offered expert testimony regarding community hostility. *E.g.*, *id.* at 2943 (Sotomayor, J., dissenting). Despite such record evidence (which, again, is utterly absent here) and the "magnitude and negative tone" of the Enron coverage, the Court held that it "did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice[.]" *Id.* at 2916 (majority opinion).

As in *Skilling*, this Court requires claims of pretrial prejudice to be supported by evidence, not speculation, and requires more than a showing that potential jurors may have seen news coverage about an event. The May 20 Order fails to apply this standard.

Skilling also holds that the lower court erred by failing to "separate media attention aimed at Skilling from that devoted to Enron's downfall

[6] Five justices joined in the portion of Justice Ginsburg's opinion addressing pretrial publicity. Concurring separately, Justice Alito expressed the view that judges need not evaluate news coverage at all, and should focus only on seating an impartial jury: "If the jury that sits and returns a verdict is impartial, a defendant has received what the Sixth Amendment requires." *Id.* at 2941 (Alito, J., concurring).

more generally." *Id.* at 2916 n.17 (citing *U.S. v. Hueftle*, 687 F.2d 1305, 1310 (10th Cir. 1982) (prejudice abates "when publicity is about the event, rather than directed at individual defendants")). The May 20 Order makes the same mistake: it fails to specify *any* alleged publicity about the individual defendants, but instead treats all news coverage about Maurice Clemmons and the November 29, 2009, shootings as prejudicial to them.

b. The May 20 Order Failed To Consider Alternatives To Protect Defendants' Fair Trial Rights

Even if there had been any showing that disclosure of the public records sought by the Times was likely to lead to prejudicial pretrial publicity (and no such showing has been made), the May 20 Order would have to be reversed because it fails to address potential alternatives that could easily remedy such prejudice. This Court has emphasized that even where the potential for prejudicial pretrial publicity has been shown, trial courts have an affirmative duty to consider alternative means to address the issue. *Bassett* is instructive:

> We appreciate the trial court's concerns regarding the publicity this case has received. Bassett and his codefendant are accused of murdering three people, one of them a child. The fact that these crimes were allegedly committed has received a substantial amount of publicity, particularly in southwest Washington, as did the arrest of Bassett and his codefendant. Although the upcoming proceedings may also generate considerable publicity, the trial court has, as we have observed above, several means ***that it must affirmatively consider to address the problems that may be caused by that publicity.***

Bassett, 128 Wn.2d at 618 (emphasis added).

Applied here, the May 20 Order was improper because the court failed to consider voir dire, careful instructions, or any other alternative short of blanket non-disclosure. The order also failed to consider whether, in a jurisdiction the size of Pierce County, it would be at all difficult to seat a jury that could act impartially. Among other things, the court failed to consider whether there had been any difficulty in seating a jury in the Latanya Clemmons trial. *See Jackson*, 150 Wn.2d at 271 ("The best test of whether an impartial jury could be empanelled is to attempt to impanel one.") (internal quotation marks and citation omitted).

3. Defendants Cannot Establish That Public Access May Be Denied Under the *Ishikawa* Factors

Even if the trial court had found a substantial probability that pretrial publicity posed a risk to defendants' fair trial rights, the remedy would not be (as the May 20 Order concluded) simply to withhold all access to the investigative reports at issue. Rather, as noted above, under the PRA and the pretrial publicity cases, the trial court would be required to evaluate alternatives to secrecy, and to make particularized findings to justify the withheld documents. Under the circumstances of this case, this Court should require that such an analysis must be performed in conformance with the standards set out in *Ishikawa* and its progeny.

Ishikawa began an unbroken line of cases in which this Court has repeatedly affirmed and expanded the public's right of access to proceedings and records, holding that infringements on the right of access – even in the face of a criminal defendant's fair trial concerns – must conform to "a strict, well-defined standard" to assure "careful, case-by-case analysis" before restrictions on access are permitted. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The standard has been applied to, among other things, pretrial motions and records (*Ishikawa*, 97 Wn.2d 30); sexual assault proceedings (*Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993)); suppression hearings (*Bone-Club*, 128 Wn.2d 254); severance hearings (*Easterling*, 157 Wn.2d at 171-72); and jury selection (*State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009)). These standards also have been applied to court records. *Ishikawa*, 97 Wn.2d 30; *Dreiling*, 151 Wn.2d 900; *Rufer*, 154 Wn.2d 530, 114 P.3d 1182 (2005).

Application of *Ishikawa* is appropriate in this case because defendants not only sought to seal from public view police reports of profound public interest, but did so for the express purpose of preventing the news media from fully and accurately reporting factual information about pending criminal matters. Even apart from the sealing orders that it spurred, the May 20 Order restricts public access to vital information

about the criminal justice system, in a manner that brings to mind *Dreiling*'s admonition that "Secrecy fosters mistrust." *Dreiling*, 151 Wn.2d at 903.

Ishikawa requires the following:

> 1. The proponent of closure and/or sealing must make some showing of the need therefor. . .
>
> 2. Anyone present when the closure ... motion is made must be given an opportunity to object ...
>
> 3. The court ... should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened. . .
>
> 4. The court must weigh the competing interests of the defendant and the public, and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory. . . .
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose. . . .

Ishikawa, 97 Wn.2d at 37-39 (citations omitted). The May 20 Order founders on the first, third and fourth factors in particular.

On the first factor, when the interest asserted is a defendant's fair trial rights, the defendant must show a "likelihood of jeopardy." *Ishikawa*, 97 Wn.2d at 37. As noted previously, defendants here have provided no evidence to suggest prejudice to their fair trial right is likely. The May 20 Order states only that potential future news coverage "may" jeopardize the

defendants' fair trial rights – a far cry from the likelihood of prejudice required by *Ishikawa*. *See id.* at 41.

The second factor requires the court to apply the narrowest means available to protect the asserted interest. Applied here, this *Ishikawa* element – like the PRA and *Cowles* – requires limiting nondisclosure to material shown to endanger defendants' fair trial rights. Any such material should be redacted, and the remaining material disclosed. The May 20 Order violates this principle by ordering blanket nondisclosure of all police records related to defendants.

The fourth factor (like *Bassett*) requires consideration of alternatives to nondisclosure, and specific, nonconclusory findings. The May 20 Order fails to consider alternatives suggested by the Times, such as searching voir dire, careful jury instructions, and redaction of truly prejudicial material. The Court also provided no factual findings justifying the withholding of any specific record, much less all of them. *See Dreiling*, 151 Wn.2d at 916-17 ("[u]nsubstantiated allegations" are insufficient; party must support its request with affidavits and "concrete examples"); *Ishikawa*, 97 Wn.2d at 41.

In sum, the May 20 Order must be rescinded under each of the standards discussed above – *Cowles*' interpretation of the PRA; *Jackson*, *Bassett*, and other cases evaluating claims of prejudicial pretrial publicity;

and *Ishikawa* and its progeny. Each of these standards prohibits blanket secrecy based on unsubstantiated apprehension about news coverage. All require starting from a presumption of disclosure, and releasing the records except for those portions, if any, for which a factual showing is made (after consideration of alternatives) that nondisclosure is essential for effective law enforcement or to protect a defendants' fair trial rights.

D. The Police Records Are Not Exempt Under Any PRA Provision

Defendants have not identified any other basis under the PRA for withholding the records at issue. The May 20 Order rests "on the exemption in RCW 42.56.540," (CP 209), and goes on to withhold every responsive record sought by the Times based on this supposed Section 540 "exemption." CP 211-225. But Section 540 is not an independent exemption to disclosure. Rather, as this Court has held several times, it is merely procedural. The provision (formerly RCW 42.17.330) "is simply an injunction statute. It is a ***procedural*** provision which allows a superior court to enjoin the release of ***specific*** public records if they fall within ***specific*** exemptions found elsewhere in the Act." *PAWS*, 125 Wn.2d at 257 (emphasis in original); *see also Soter*, 162 Wn.2d at 756-57. The May 20 Order must be reversed because it withholds records under Section 540, untethered to any specific PRA exemption.

Defendants also argued below that the police records sought by the Times constituted "work product" of the prosecutor, and thus are exempt under RCW 42.56.290 (formerly RCW 42.17.310(j)). CP 208. The May 20 Order correctly rejected this contention. *Id.* Notably, the Pierce County Prosecutor's Office has not asserted that the PRA requests infringe on its work product. Moreover, the records requested here consist entirely of police records generated by the investigating agencies, not the prosecutor. *See* CP 95-99. Defendants' attempt to characterize such records as "work product" is contrary to *Cowles*, which holds that "[g]enerally, nothing in a police investigative file would be considered attorney work product." *Cowles*, 139 Wn.2d at 478. This Court has held that "not even prosecution files are categorically exempt from disclosure." *Id.* (citing *Limstrom v. Ladenburg*, 136 Wn.2d 595, 613, 963 P.2d 869 (1998)). "Instead, documents are protected from disclosure to the extent they are attorney 'work product' under the civil discovery rules," which is not the case with investigative files generated by police agencies in the normal course of police work. *Cowles*, 139 Wn.2d at 478. Thus, the Times' record request cannot be denied under the PRA's work product exemption, or any other PRA provision.

E. The June 9 Order and Subsequent Sealing Orders Are Unconstitutional Under *Ishikawa*, *Rufer* and *Dreiling*

Judge Serko's May 20 Order addressed the disclosability of records sought under a PRA request. The order makes no findings regarding the sealing of documents entered in open court, either as a general matter or with respect to the Latanya Clemmons trial exhibits. CP 205-226. In fact, Judge Serko expressly stated that her May 20 Order did ***not*** consider the Clemmons exhibits: she was unsure which, if any, of the documents on the PCSO CD that she reviewed *in camera* had been used at the Clemmons trial, and she believed that the standard for sealing court records and proceedings did not apply to the PRA matter before her. *See* RP (6/7/10) at 12:14-15, 20:25-21:1, 35:22-36:4, 37:12-19.

Despite these facts, on June 9 Judge Chushcoff entered an *ex parte* order retroactively sealing all of the Latanya Clemmons trial exhibits, after they had already been used at the open trial of Latanya Clemmons. CP 286. The sole basis cited for the sealing was the May 20 Order. *Id.*

The June 9 sealing order is facially invalid. Under GR 15, *Rufer*, and *Dreiling*, exhibits used at trial cannot be sealed unless the court engages in the five-part *Ishikawa* analysis. Failure to do so violates article 1, § 10 of the Washington constitution. *See Rufer*, 154 Wn.2d at 540, 544. Among other things, the June 9 Order:

- fails to provide adequate notice to interested parties, as required by GR 15(c)(1) and the second *Ishikawa* factor;
- fails to set forth written findings justifying sealing, as required by GR 15(c)(2);
- makes no finding that sealing was the least restrictive means available, as required by the third *Ishikawa* factor;
- fails to weigh the public's interest in access or to consider alternatives to sealing, as required by the fourth *Ishikawa* factor.

Moreover, both the June 9 Order and all of the subsequent sealing orders entered by the court below (CP 294, 297, 362) are inadequate to the extent they rely on the May 20 Order. Again, that PRA order does not acknowledge – must less apply – the standard for sealing court records.

This Court should repudiate the Clemmons sealing orders to the extent they rely on the May 20 Order, and should restore the trial exhibits to their previous, publicly available status, because the defendants below have failed – despite numerous opportunities – to make the heightened showing required to seal court records. As it stands, much of the evidence used to pass judgment on Ms. Clemmons is now hidden from public scrutiny. Sealing under these circumstances contravenes the state's constitutional mandate of openness, to the detriment of both the public and

the judicial system. "Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust." *Dreiling*, 151 Wn.2d at 903-04.

The record is sufficient for this Court to conclude that defendants cannot justify sealing the Clemmons exhibits. On the first *Ishikawa* factor, defendants claim that sealing is necessary to protect their constitutional right to a fair trial. But *Ishikawa* requires a "likelihood of jeopardy" to that right, 97 Wn.2d at 37, and the defendants are required to present evidence of "the actual impact of publicity on potential jurors[.]" *Id.* at 41. "Unsubstantiated allegations will not satisfy the rule. The requesting party must support, where possible, its request by affidavits and concrete examples.... Particularized findings must be made by the trial court to support meaningful review." *Dreiling*, 151 Wn.2d at 916-17. At no time have defendants shown that publicity about their cases is "likely" to jeopardize their right to a fair trial. They have not come forward with evidence or concrete examples. Instead, they rely only on the May 20 Order. But that order's finding that further publicity "may" result in prejudice (but has not so far) is an insufficient basis on which to seal. CP 211; *Ishikawa*, 97 Wn.2d at 41.

On the third *Ishikawa* factor, neither the May 20 Order nor the sealing orders contain a "least restrictive means" analysis, and they do not consider alternatives to complete sealing of the records at issue. At a minimum, before sealing any trial exhibit, the court below should have considered alternatives suggested by the Times, including careful voir dire and cautionary jury instructions. *See Bassett*, 128 Wn.2d at 616. Given the size of the Pierce County jury pool and the fact that a jury was successfully seated in the Clemmons trial, voir dire alone would be enough to assure the court's ability to seat an impartial jury for the remaining defendants.

Moreover, before sealing an entire trial exhibit, a court ***must*** consider whether redaction of limited information would suffice. "Entire documents should not be protected where mere redaction of sensitive items will satisfy the need for secrecy." *Dreiling*, 151 Wn.2d at 917; GR 15(c)(3). Neither the May 20 Order nor the sealing orders considered redaction.

Furthermore, defendants do not, and cannot, explain how limiting access to the exhibits would be "effective" in protecting their fair trial rights. Keeping court files secret cannot be justified when the information has already been made public. *See, e.g., California ex re. Lockyer v. Safeway*, 355 F. Supp.2d 1111, 1118-20 (E.D. Cal. 2005) (refusing to seal

records that are "a matter of public knowledge as a historical fact" or were disclosed in other filings); *Dreiling*, 151 Wn.2d at 914 (sealing permitted only if "effective in protecting the interests threatened."). Here, the trial exhibits at issue were public for a time. They have already been seen by those present in the packed courtroom, and some have been reported in the press. *See, e.g.*, http://tinyurl.com/2c2qecg (5/20/2010 *Seattle Times* story reporting on taped interview with Latanya Clemmons played at her trial); RP (7/14/10) 47:18-20; *see also State v. Coe*, 101 Wn.2d 364, 380-81, 679 P.2d 353 (1984) ("A trial is a public event. What transpires in the court room is public property.... Those who see and hear what transpired can report it with impunity") (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). Sealing at this stage would serve no purpose.

On the fourth factor, *Ishikawa* is clear that courts have an affirmative duty to try to accommodate ***both*** a defendant's fair trial right ***and*** the public's interest in access. *Ishikawa*, 97 Wn.2d at 45. The public interest in these cases is manifest. The heavy attendance at the Clemmons trial, and the widespread media interest in the events of November 29 generally, demonstrate that fact. Yet neither the June 9 Order nor the other sealing orders to date have considered the overriding public interest in assuring open access to the exhibits used to convict Latanya Clemmons.

Instead, they rest on the May 20 Order, which completely discounted the public's interest in access.

For the foregoing reasons, this Court should invalidate the June 9 Order, and all other sealing orders relying on the May 20 Order, and should order the Clemmons trial exhibits unsealed at this time.

F. The Requested Writ Should Be Granted, and the Court Should Provide Clear Guidance for Trial Courts Faced With Motions To Enjoin Release of Public Records Related to Pending Criminal Cases

The Times is entitled to a writ of mandamus. The statutory elements of duty, remedy, and beneficial interest, RCW 7.16.160, .170, are all satisfied here. Superior court judges have a clear duty to follow statutory and constitutional authority and the holdings of this Court – including the Public Records Act, *Cowles*, and the other authority discussed above regarding the public's right of access to public records and court filings. The Times has no other "plain, speedy and adequate remedy in the ordinary course of law," RCW 7.16.170, for reasons set forth in its Petition for Mandamus (at ¶ 10) and Reply (at 4-7). Finally, the Times is beneficially interested in this matter, RCW 7.16.170, because it submitted the PRA requests described herein and, more generally, because it has an interest in access to public records and court documents

on newsworthy matters. Accordingly, the Times is entitled to the writ requested in the Petition.

This Court should issue clear guidelines to trial courts faced with the circumstances presented here – that is, motions seeking, in the context of pretrial criminal proceedings, to enjoin release of police investigative records about the underlying incident. The issue arises frequently, and has the potential to frustrate the purpose of the PRA by imposing delay and expense on access to public records. In particular, the press routinely requests and receives public records about criminal investigations, and reports on them to the public:

> In the case of police investigations, the public certainly has a right to know whether such investigations are competent, fair, and expeditious, so the public may hold accountable those elected officials responsible for law enforcement. The news media, in their traditional and honored role, act to keep the public informed of such matters. ***Access to police investigatory records is therefore essential for the media to fulfill their role*** as the public's informant.

Cowles, 139 Wn.2d at 485 (Talmadge, J., concurring) (emphasis added). Being forced to litigate over records that (as *Cowles* recognized) are routinely released before trial, based on flimsy or non-existent evidence of prejudice, will severely hinder important news reporting about law enforcement.

Accordingly, in resolving this case, the Times respectfully asks the Court to hold that when faced with a motion seeking to enjoin the release

of investigative records involving an identified defendant based on claims of potentially prejudicial pretrial publicity, a trial court must (1) presume that the records are disclosable; (2) scrutinize the defendant's claim of prejudice carefully, requiring evidence of specific harm to the ability to seat an impartial jury rather than generalized or unsupported concerns about news coverage; (3) consider alternatives to nondisclosure, such as voir dire and jury instructions, that could obviate the risks of publicity; (4) limit nondisclosure to only those documents, or portions of documents, that, for specifically identified reasons, pose a substantial risk of prejudice; and (5) support any nondisclosure with particularized record findings.

VI. CONCLUSION

For the foregoing reasons, the Times respectfully asks this Court to issue a writ of mandamus compelling public access to the records sought in the Times' PRA requests and to the Latanya Clemmons trial exhibits. Alternatively, the Court should issue instructions to the court below regarding the correct legal standard to apply to attempts to deny access to these records.

RESPECTFULLY SUBMITTED this 30th day of July, 2010.

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DECLARATION OF SERVICE

I hereby declare that on July 30, 2010, I caused the foregoing document to be filed with the Washington State Supreme Court and arranged for copies to be served upon the following attorneys via email and U.S. Mail:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 30th day of July 2010, at Seattle, Washington.

Eric M. Stahl, WSBA #27619